



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: AUGUST 17, 2022

IN THE MATTER OF:

Appeal Board No. 622698

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 622696, 622697 and 622698, the claimant appeals from the decisions of the Administrative Law Judge filed March 28, 2022, which sustained the initial determinations holding the claimant ineligible to receive benefits, effective March 29, 2021 through August 31, 2021, on the basis that the claimant was not available for employment; charging the claimant with an overpayment of \$3,185.00 in benefits recoverable pursuant to Labor Law § 597 (4), \$816.00 in Pandemic Emergency Unemployment Compensation

(PEUC) benefits repayable pursuant to § 2107 (e) (2) of the Coronavirus Aid,

Relief, and Economic Security (CARES) Act of 2020, and \$6,300.00 in Federal Pandemic Unemployment Compensation (FPUC) repayable pursuant to § 2104 (f) (2)

of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 70 effective days and charging a civil penalty of \$1,545.15 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There was an appearance by the claimant.

The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked part time, approximately 20 hours per week, as a merchandiser at an electronics store. At the outset of the COVID-19 pandemic, she filed a claim online on April 22, 2020 and established a weekly benefit rate of \$204.00.

The claimant's mother was hospitalized with COVID from February 27 to approximately March 10, 2021, when her mother was discharged home to the apartment where the claimant and her mother lived together. The claimant began at-home care for her mother as soon as her mother was discharged.

In caring for her mother at home, the claimant dispensed her mother's medications, assisted with physical therapy and wound care, assisted her mother with bathing and personal care, prepared her mother's meals, and managed her mother's oxygen machine. She also took the lead in speaking to her mother's doctors, and she obtained her mother's medications from the pharmacy. Nobody else was available to care for the claimant's mother.

The claimant was approved for FMLA to care for her mother from March 27 through August 31, 2021. During this period, the claimant was not working for the employer, as her job could not be done remotely. The claimant had never done remote work for any employer. The claimant's last day of work was March 27, 2021.

The claimant received an email from the Department of Labor dated April 9, 2021 advising her that she may be eligible to file a new claim. The claimant filed a new claim online on May 5, 2021 and established a weekly benefit rate of \$182.00. The claimant returned to work on September 1, 2021.

**OPINION:** The credible evidence establishes that the claimant was caring for her mother at home from March 27 through August 31, 2021. During this time, the claimant was the only person available to communicate with her mother's doctors, manage her mother's medications and medical equipment, assist with therapies and personal care, and prepare meals. We are not persuaded by the claimant's contention that she nevertheless was available for work because she could work remotely. The Appellate Division has held that "[a] claimant will not be deemed eligible to receive unemployment insurance benefits if he or she is not ready, willing and able to work in his or her usual employment or in any other for which he or she is reasonably fitted by training and experience" (see *Matter of Ormanian*, 167 AD3d 1183 [3d Dept 2018]). As the claimant

admittedly has never worked remotely for any employer, we cannot find that the claimant was trained and experienced in remote work (see Appeal Board No. 622690). Appeal Board No. 613083 is not to the contrary, as the decision in that case does not find that the claimant had no history of working remotely. Accordingly, we conclude that, for purposes of the Unemployment Insurance Law, the claimant was not available for work and is ineligible for benefits.

Our review of the record, however, reveals that the case should be remanded to hold a hearing concerning the issues of recoverable overpayment of regular unemployment, PEUC and FPUC benefits, willful misrepresentation and civil monetary penalty. On appeal, the claimant contends she reasonably believed in good faith that she was available for remote work, and she has produced some evidence that she was seeking remote work during the time period at issue. The Board has determined that the claimant should be afforded another opportunity to provide testimony and evidence regarding her belief that she was available for work. At the hearing, the claimant shall be questioned regarding the types of remote work she thought she was available to perform, the extent to which she searched for remote work during the time period at issue, the amount of time she spent caring for her mother each day, and the time period(s) each day when she believed

she would be available for work. The Judge shall take such further testimony and evidence as may be necessary to complete the record. The claimant is directed to produce any evidence of her search for remote work to the Hearing Section at least three days prior to the remand hearing.

DECISION: In Appeal Board No. 622696, the decision of the Administrative Law Judge, which sustained the initial determination of lack of availability for work, is affirmed.

In Appeal Board No. 622696, the initial determination, holding the claimant ineligible to receive benefits, effective March 29, 2021 through August 31, 2021, on the basis that the claimant was not available for employment, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

In Appeal Board Nos. 622697 and 622698, the decisions of the Administrative Law Judge, which sustained the initial determination of recoverable overpayment of regular unemployment, PEUC and FPUC benefits, and sustained the initial

determination of willful misrepresentation and civil monetary penalty, are rescinded.

Now, based on all of the foregoing, it is

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues of recoverable overpayment of regular unemployment, PEUC and FPUC benefits, willful misrepresentation and civil monetary penalty, only, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing the remanded issues of recoverable overpayment of regular unemployment, PEUC and FPUC benefits, willful misrepresentation and civil monetary penalty, only; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the remanded issues only, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MICHAEL T. GREASON, MEMBER